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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 606

H. GORDON HOWARD, Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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MARCH, 1962.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 698

H. GORDON HOWARD, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

We do not think that the questions presented by this case are those stated in the petition. In our opinion there is only one

QUESTION PRESENTED

Whether the procedures followed by the Supreme Court of Colorado in the suspension from the bar and the disbarment of petitioner deprived the petitioner of rights granted by the Fourteenth Amendment of the Constitution of the United States.

CONCISE STATEMENT OF THE CASE

Petitioner, H. Gordon Howard, was an attorney at law licensed to practice law in the State of Colorado.

Because of certain dealings with one Mary E. Hall, the petitioner was involved in a lawsuit in which a judgment was rendered against him in the trial court. Petitioner brought this case to the Supreme Court of the State of Colorado for review where the judgment was affirmed *Howard v. Hall*, [redacted].

Because of certain dealings with one Mary Stanley, petitioner was involved in a lawsuit in which a judgment was rendered against him in the trial court. Petitioner brought this case to the Supreme Court of the State of Colorado for review where the judgment was affirmed *Howard v. Fitzgerald and Stanley*, [redacted].

The show cause order issued by the Supreme Court of Colorado on August 10, 1959 was based on the records in these two cases and on a hearing held on August 4, 1959 in which petitioner was afforded an opportunity to be heard and was heard at length. *People of the State of Colorado v. H. Gordon Howard*, [redacted].

At a subsequent hearing held before the Grievance Committee of the Supreme Court, the records of these two cases were considered by the Committee and the petitioner was given opportunity to rebut, overcome and explain these records and consumed over two days in the presentation of his defense. The Committee recommended that

the petitioner be disbarred. This recommendation was followed by the Supreme Court of the State of Colorado and the petitioner was disbarred on August 21, 1961. *People of the State of Colorado v. Howard*, Colo. , 363 P.(2d) 380.

REASONS FOR DENYING WRIT

1. The disbarment of an attorney is a matter within the exclusive jurisdiction of the State Court and is not reviewable by this Court unless there has been a clear violation of the United States Constitution.

2. The complaint filed against petitioner was legally correct and fully apprised the petitioner of the charge of misconduct being brought against him.

3. Petitioner was a party to both civil actions and was present in person at the trial of both cases. At both trials petitioner or his counsel had full opportunity to cross-examine all witnesses and in fact did cross-examine the witnesses and presented testimony on petitioner's behalf. The issues in the two civil cases were exactly the same as those in the disbarment proceeding, to wit: Did petitioner while acting as agent for and later as attorney for one Mary E. Hammon, an aged woman and mental incompetent, between on or about February 11, 1957 and on or about March 11, 1957, by imposition, fraud and deceit obtain from said Mary E. Hammon the sum of $1,000 in cash and an original note payable to petitioner's wife in the sum of $20,000, without any consideration therefor and to which petitioner or his wife were not entitled, and did petitioner, while acting as agent for Mary Stoddart, a partially blind woman of the age of 88 years, from during the month of April and May, 1956, fraudulently and deceitfully induce said Mary Stoddart to execute

a Warranty Deed by means of which real estate in the County of La Salle, Illinois, was purportedly conveyed by her to said petitioner and to execute a receipt for the sum of $6,000.00 in payment for said real estate, when in truth and in fact said Mary Steinhart had no intention of conveying said real estate to said petitioner and did not receive said $6,000.00 or any consideration therefor. At the suspension hearing, petitioner was given the opportunity to present any defense he might have to the charges. Petitioner was again afforded this opportunity in the hearing before the Grievance Committee at which hearing he in fact did present his defense consuming over two days in its presentation.

4 The reading of the opinions of the Supreme Court of Colorado in the two civil cases in which petitioner was a party was not a violation of any of his rights guaranteed by the Fourteenth Amendment of the United States Constitution. The facts and issues were the same in the disciplinary proceeding as they were in the civil cases. The cases were related in that the petitioner was a defendant or a respondent in each action and in each action his conduct was the sole issue. The burden of proof in Colorado in a civil action is a preponderance of the evidence. No authority is cited by the petitioner for the proposition that a more exacting burden of proof is required in a disbarment proceeding. Even if a more exacting burden is required, whether this burden was met by the transcript of the testimony in these cases was a matter for the determination of the Supreme Court of Colorado alone.

5 The question of the admissibility of the records of civil actions in a disbarment proceeding has never be-

fore been decided by the Colorado Supreme Court. Other courts in other states have determined that such records are admissible in disbarment proceedings even though not ordinarily admissible in civil or criminal actions. The Colorado Court in deciding that such records are admissible in this kind of proceeding followed these decisions. Since this question has never before been decided by the Colorado Court the petitioner is in error in his argument that the Court has violated its own rules and decisions.

6. Petitioner had equal protection of the laws and was not denied due process of law. Petitioner did in fact confront and cross-examine the witnesses against him in the civil actions mentioned and in the disciplinary proceeding he was afforded an opportunity to be heard and was given ample and proper notice of the charges brought against him. The only questions presented are questions of evidence which are within the province of the state court to decide. The Colorado Court has decided, as have other states, that the records of other actions are admissible in disbarment proceedings.

SUMMARY OF THE ARGUMENT

I. This Court should not assume jurisdiction in this case.

II. The formal complaint was legally adequate and gave petitioner notice of the charges against him.

III. The reading of the opinions in the two civil actions and the admission into evidence of the transcripts of the testimony and the records in those cases were not in violation of the United States Constitution or the Constitution of the State of Colorado.

ARGUMENT

I

THIS COURT SHOULD NOT ASSUME JURISDICTION IN THIS CASE

This Court does not have power or authority to re-examine or reverse as a reviewing court the action of the Supreme Court of a state in suspending or otherwise disciplining a member of the bar of the courts of that state for personal and professional misconduct. *Selling v. Radford*, 243 U. S. 46. It is not for this Court, except within narrow limits, to sit in judgment on state disbarments. *Theard v. United States*, 354 U. S. 278.

This is not a case which falls within the narrow limits in which this Court will sit in judgment on a state disbarment such as existed in *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, and in *Konigsberg v. State Bar of California*, 353 U. S. 252. In both of those cases the petitioners were denied admittance to the bar because of previous affiliation with the Communist party which party was a legal political party at the time of the affiliations in question and such denial of admittance was arbitrary and unreasonable.

In deciding *Schware v. Board of Bar Examiners of the State of New Mexico*, supra, at page 248 Mr. Justice Frankfurter in a separate opinion said:

> "It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular state for admission to its bar. No double satisfaction of the requirement of moral

character involves an exercise of delicate judgment on the part of those who reach a conclusion . . . especially in this realm it is not our business to substitute our judgment for the state's judgment—for it is the state in all the panoply of its powers that is under review when the action of its Supreme Court is under review."

" . . . to a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession."

We respectfully submit that these words of Mr. Justice Frankfurter apply with equal force to the disbarment of an attorney and that this Court should entertain jurisdiction over this case only if it finds that the requirements of due process have been clearly violated by the State Court's action in its finding, from the evidence it had before it, that the petitioner committed acts which were and are contrary to acceptable standards of honesty, integrity and morality, which demonstrated his unfitness to continue in the practice of law.

THE FORMAL COMPLAINT WAS LEGALLY ADEQUATE AND GAVE PETITIONER NOTICE OF THE CHARGES AGAINST HIM.

In the case of *Ex Parte Wall*, 107 U. S. 265, this Court was called upon to rule on the adequacy of an order directed to an attorney advising him that it had come to the "knowledge" of the court that the attorney had engaged in a lynching and directing him to appear on a date certain to show cause why he should not be disbarred. This Court held the order adequate and affirmed the disbarment quoting with approval from *Ex Parte Steinman*, 95 Pa. 220, as follows:

> "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice and been afforded an opportunity to be heard in his defense."

In the same case this Court also quoted with approval from *Randall v. Brigham*, 7 Wall. 539, as follows:

> "But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court; and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice, or of the complaint by letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charges against him; and it is not pretended

that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct."

We respectfully submit that the formal complaint filed in this case is in compliance with the above requirements because it gave petitioner reasonable notice and he understood from it the nature of the charges against him. Since his defense consumed in excess of two days, it cannot be successfully contended that petitioner was not afforded an opportunity to be heard in his defense.

III.

THE READING OF THE OPINIONS IN THE TWO CIVIL ACTIONS AND THE ADMISSION INTO EVIDENCE OF THE TRANSCRIPTS OF THE TESTIMONY AND THE RECORDS IN THOSE CASES WERE NOT IN VIOLATION OF THE UNITED STATES CONSTITUTION OR THE CONSTITUTION OF THE STATE OF COLORADO.

The due process clause of the Fourteenth Amendment of the Constitution of the United States guarantees notice and an opportunity to be heard. The equal protection of the laws clause guarantees that all persons shall be treated equally. The petitioner was given proper and ample notice of the proceedings and availed himself of the opportunity to be heard. Therefore, he was not denied due process of law. The procedures questioned are strictly matters of evidence which are within the province of the State

Court. The State Court in this case has followed precedent set in other jurisdictions and has determined that records in civil actions to which an attorney is a party are admissible in disbarment proceedings brought against him. Petitioner has not shown that in other disbarment proceedings brought against other attorneys in Colorado this type of evidence was excluded and that he has, therefore, been treated differently from other attorneys and thus deprived of equal protection of the laws. On the contrary the great weight of authority seems to uphold the proposition that such records are admissible in disbarment proceedings.

We concede that the general rule in civil cases is to the effect that the record of testimony in one case is not admissible in another unless the actions are between the same parties or their privies and then only when the witness is deceased or unavailable. However, there is a well recognized exception in the case of a disciplinary proceeding against an attorney.

It was held in the following cases that the record of the testimony in another case respecting the conduct of an attorney was admissible in a disciplinary proceeding against him:

Hallinan v. State Bar, 24 Calif. (2d) 611, 150 P (2d) 892.

Louisiana State Bar Association v. Seabell, 231 La. 655, 92 So (2d) 571.

Armitage v. Bar Rules Committee, 223 Ark. 465, 266 SW (2d) 818.

State v. Gudmundson, 145 Neb. 324, 16 NW (2d) 474.

In Re Lacy, 239 Mo. App. 71, 112 SW (2d) 504.

In Re Wilson, 76 Ariz. 49, 258 P (2d) 433.

In Re Dupont, 80 Conn. 140, 67 A. 497.

In Re Keenan, 314 Mass. 544, 50 NE (2d) 785.

In Re Santosuosso, 318 Mass. 489, 62 NE (2d) 105, 161 ALR 892.

In Re Thatcher v. United States, (8th C.A. 5th Circuit 1914), 212 Fed. 861.

The strict rules of evidence do not apply in a disbarment proceeding although they are frequently invoked to insure a fair hearing. *Werner v. State Bar*, 24 Calif. (2d) 611, 150 P (2d) 892. This exception seems to be based on the theory that a "disbarment" proceeding is much like a proceeding before an administrative agency where the rules of evidence as to hearsay are not strictly enforced. *Louisiana State Bar Association v. Sackett*, 231 La. 655, 92 So (2d) 571; *Armitage v. Bar Rules Committee*, 223 Ark. 465, 266 SW (2d) 818.

Chapter 20, of the Colorado Rules of Civil Procedure, Sec. 254 in applicable part provides:

> "To warrant a finding of misconduct, the charges must be established by substantial, clear, convincing and satisfactory evidence."

In the case of *State v. Gudmundsen*, 145 Neb. 324, 16 NW (2d) 474, the court at page 476 said:

> "It is therefore the holding of this court that the the finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment; that notwithstanding the finding in the civil action the

culpability of the attorney must be established in the disbarment action by a clear preponderance of the evidence. For this purpose the evidence taken at the trial of the civil action and all other competent evidence is admissible."

In the present case the records and transcripts were not taken by the Committee as conclusive of petitioner's misconduct, but on the contrary the Committee received the records and transcripts of the civil cases only as evidence of his misconduct and gave petitioner the opportunity of presenting all other competent evidence to rebut, overcome and impeach the contents of these records.

In the case of *Werner v. State Bar*, 24 Calif. (2d) 611, 150 P (2d) 892, the court said:

"There is no legislative requirement, therefore, that the rules of evidence in the code of civil procedure be applied in disbarment proceedings, although they are frequently invoked to insure a fair hearing. There is no reason for invoking them, however, if they are not necessary to serve that purpose. (Page 893)

"Hearsay evidence is often excluded to insure that all evidence may be tested by cross-examination. . . . On three successive trials petitioner had the oportunity to cross-examine the witnesses against him and the record shows that he fully exercised the right at the last trial so that there is little likelihood that any significant weakness in the testimony of the witnesses was overlooked. On essentially similar facts, in Re Durant, 80 Conn. 140, 67 A 497, 10 Ann. Cas.

539, and in *In re Lacy*, 234 Mo. App. 71, 112 SW (2d) 594, it was held that the record of a previous trial was admissible in a disbarment proceeding, and it was noted that when the court thus exercises its power to supervise its officers in a proceeding in which a jury has no part, there is no need to adhere strictly to rules made primarily to govern jury trials. (Page 894)

"The requirement that parties and subject matter be the same is designed to make certain that the cross-examination in the first proceeding can serve as well in the second. . . . Since this purpose is fulfilled, the transcript was properly admitted. Moreover, petitioner was free to introduce additional evidence in his own behalf but did not avail himself of this right." (Page 894)

In the present case petitioner availed himself of this right consuming over two days in the presentation of his case. Petitioner was personally present in both civil actions and had full opportunity to cross-examine and did cross-examine all witnesses either personally or through counsel and the cross-examination in the civil proceedings served as well in the present proceeding.

In objecting to the admission into evidence of these records, petitioner fails to draw the distinction existing between the case at bar and the ordinary civil or criminal proceeding. In the case of *In Re Lacy*, 239 Mo. App. 71, 112 SW (2d) 594, at Page 601, the court drew this distinction saying:

"In his brief and argument, the respondent has

proceeded on the theory that this is an adversary proceeding. We do not so understand it. It is an investigation by the court into the conduct of one of its officers and is neither a civil action nor a criminal proceeding, but a proceeding sui generis, the object of which is not to punish the offender, but to protect the court."

At Page 604 in the same case the court continues as follows:

"The admission to the Bar and a license to practice his profession does not confer upon one any vested right to continue in such practice. * * * The inquiry should not be limited or circumscribed by the strict rules of evidence.

"In this proceeding the informants are investigating and making an inquiry into the conduct of respondent in a former trial. In his testimony in that trial, Keeton described the conduct of respondent. He was properly cross-examined and we think that his testimony is admissible in this inquiry."

Again, in the case of *In Re Wilson*, 76 Ariz. 49, 258 P (2d) 433, the court draws this distinction at Page 435 as follows:

"Were this a proceeding in a criminal action, or a suit between parties in a civil matter, the objections as to foundation and identification would raise a serious question. However, the right to practice law is not an inherent right but a peculiar privilege granted and continued only to those who demonstrate special

tness as intellectual attainment and in moral character. Just as only those who pass the tests can enter the profession, only those who maintain the standards are allowed to remain in it."

And at Page 436 said:

"These cogent principals cannot be defeated by the strict rules of evidence. The integrity of the courts and the safety of the public override such a view."

In the case of *In Re Durant*, 80 Conn. 140, 67 A. 497, at Page 501 of the Atlantic reports the court discussed this subject as follows:

"The action of the court in the exercise of this power (disbarment) is judicial in its character, but the inquiry made is 'in the nature of an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit,' and the order entered is but an exercise of the disciplinary jurisdiction which it has over such officers. * * * The real question for determination in such proceedings is whether or not the attorney is a fit person to be longer allowed the privileges of being an attorney.

"In its determination, therefore, naturally and necessarily enters a large measure of judicial discretion. This discretion, however, is not an absolute one so that an attorney may be removed from the bar without notice of the charges against him and an opportunity to be heard. * * * The attorney is, in other words, entitled to a fair hearing or opportunity to be heard and a fair determination of the question at issue, in the exercise of a sound judicial discretion.

> "* * * In the absence of prescribed regulations the manner of the proceeding, so that it be without oppression or injustice, is for the court itself."

In objecting to the admissibility of these records petitioner also ignores the uniqueness of the privilege of practicing law and the inherent power of the court to deny or take away the privilege for just cause. In the case of *In Re Durant*, supra, at Page 300 of the Atlantic report the court said:

> "An attorney at law is an officer of court, exercising a privilege or franchise to the enjoyment of which he has been admitted not as a matter of right, but upon proof of fitness, through evidence of his possession of satisfactory legal attainments and fair private character. * * * For the manner in which this privilege or franchise is exercised he is continually accountable to the court, and it may at any time be declared forfeited for such misconduct, whether professional or non-professional, as shows him to be an unfit or unsafe person to manage the business of others in the capacity of an attorney. * * * The power to declare this forfeiture is a summary one inherent in the courts, and exists, not to mete out punishment to an offender, but that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession."

In the case of *In Re Keenan*, 314 Mass. 544, 50 NE (2d) 785, the court in deciding a similar question as to the admissibility into evidence of records of another

case at Page 780 discussed the privilege of practicing law as follows:

> "The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character. All may aspire to it on an absolutely equal basis, but not all will attain it. Elaborate machinery has been set up to test applicants by standards fair to all and to separate the fit from the unfit. Only those who pass the test are allowed to enter the profession, and only those who maintain the standards are allowed to remain in it." All of this is familiar enough. It is adverted to here only for the purpose of emphasizing at the outset that in deciding a case of this kind considerations of public welfare are wholly dominant."

In the case of *In Re Santosuosso*, 318 Mass. 489, 62 NE(2d) 105, 161 ALR 892, the court quoted the above language from *In Re Keenan*, supra, and then said:

> "These paramount considerations cannot be defeated by the application to such proceedings as the present one of the strict rules of evidence governing the trial of adversary proceedings between parties. The necessity for the preservation of the integrity of the courts and the safety of the public rises above the strictly technical rules of evidence that govern such adversary proceedings between parties. We are of the opinion that the evidence contained in the record offered by counsel designated by the court to conduct

> the proceeding, that is, the evidence adduced at the hearing in the Superior Court of the equity suit in question, at which the respondent, a party thereto, was present and represented by counsel, testified and had full opportunity to present and examine witnesses and to cross-examine those called by the plaintiff, is admissible in the present inquiry." (Page 107)

The last quoted case is directly in point with the case at bar in that the only evidence introduced against the respondent in the cited case was the record of a civil case in equity. The petitioner in the case at bar as in the cited case was a party to the civil actions, was personally present in both cases, was represented by counsel in one, testified, had full opportunity to and did present and examine witnesses and had full opportunity to, and did personally, or by his counsel, cross-examine witnesses called by the plaintiffs.

A great part of the record in each civil case consists of the testimony of petitioner himself. The records were brought to the Colorado Supreme Court by petitioner for review and he thus vouched for their authenticity. The conduct for which he was tried before the Grievance Committee was the same conduct for which he was tried in the District Court upon the complaints of the plaintiffs in those cases. The judgments rendered in those cases were reviewed and affirmed by the Colorado Supreme Court as a result of a writ of error sued out by petitioner.

CONCLUSION

1. This Court should not assume jurisdiction over this case.

2. Petitioner had notice of the charges against him, had an opportunity to be heard, and was heard in his defense.

3. The records of the two previous civil actions were admissible.

4. The petitioner was not deprived of any rights guaranteed by the United States Constitution or the Constitution of the State of Colorado.

5. The petition for writ of certiorari should be denied.

Respectively submitted,

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